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Nos. 06-969, 06-970

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IN THE

Supreme Court of the United States

FEDERAL ELECTION COMMISSION,

Appellant,

v.

WISCONSIN RIGHT TO LIFE, INC., *et al.*,

Appellees.

McCAIN,

Appellant,

v.

WISCONSIN RIGHT TO LIFE, INC.,

Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BRIEF *AMICI CURIAE* OF NORMAN DORSEN, ARYEH NEIER, BURT NEUBORNE, AND JOHN SHATTUCK IN SUPPORT OF APPELLANTS

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STATEMENT OF INTEREST

Amici are former officials of the American Civil Liberties Union ("the ACLU"), who are committed both to a robust First Amendment and to the effective restriction of corporate treasury funds in electoral campaigns.[1] Norman Dorsen served as President of the ACLU from 1976-1991, and as its General Counsel from 1969-1976. He is currently Stokes Professor of Law at New York University School of Law. Aryeh Neier served as Executive Director of the ACLU from 1973-1981. He is currently President of the Open Society Institute. John Shattuck served as Director of the ACLU's Washington, D.C., office, and as a National Staff Counsel from 1971-1984. He is currently Executive Director of the JFK Library Foundation. Burt Neuborne served on the legal staff of the ACLU for eleven years, serving as National Legal Director from 1981-1986. He is currently Inez Milholland Professor of Civil Liberties at New York University School of Law. *Amici* urge this Court to reaffirm the balance of constitutional interests that it struck in *McConnell v. FEC*, 540 U.S. 93 (2003), and *Wisconsin Right to Life, Inc. v. FEC*, 546 U.S. 410 (2006) ("*WRTL I*"), by reversing the decision of the court below.

SUMMARY OF ARGUMENT

In recent years, the battle over whether corporations may use treasury funds to affect the outcome of federal elections has taken the form of a strategic game between challengers and defenders of the Bipartisan Campaign Reform Act of 2002 ("BCRA"). Both sides have sought to exploit an alleged

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[1] All parties have consented to the filing of this brief. Copies of their written consents have been filed with the Clerk of the Court. Pursuant to Supreme Court Rule 37.6, *Amici Curiae* state that no counsel for a party has authored any part of this brief, and no one other than *Amici* or their counsel has made a monetary contribution to its preparation or submission.

difficulty in distinguishing "electioneering speech" (subject to regulation) from "issue speech" (protected from regulation), in an effort to advance their polar views. Proponents of corporate-funded electioneering have argued that, in order to preserve constitutionally protected issue speech, a broad loophole must be opened in section 203 of BCRA ("Section 203"), insulating from regulation speech that qualifies as "electioneering communications" as long as the literal text of advertising avoids an explicit call to electoral action. Conversely, opponents of corporate-funded electoral speech have argued that, in order to preserve the effective prohibition of corporate-funded electioneering, it is necessary to tolerate the restriction of at least some corporate-funded issue speech.

This Court has rejected both extremes. In *McConnell*, this Court upheld the facial constitutionality of Section 203, ruling that corporations do not enjoy a First Amendment right to expend treasury funds on electioneering speech. The ruling followed almost 30 years in which corporations enjoyed an unfettered *de facto* right to use treasury funds to influence federal campaigns, as long as their advertising avoided "magic words" of express advocacy. Congress enacted Section 203 to close that loophole, which had permitted an avalanche of corporate campaign spending, and the *McConnell* Court sustained the provision. But this Court recognized in *WRTL I* that an as-applied exemption from Section 203 might be constitutionally compelled in the context of genuine issue speech at the periphery of the electoral process. *See infra* Point I.

In granting as-applied relief without a full review of the factual context, the District Court turned the law of as-applied challenges on its head. The decision below ignored the purpose of an as-applied challenge, which is designed to permit a fact-specific analysis of plaintiff's particular circumstances. *See infra* Point II (A). The District Court's

assertion that consideration of the facts would be administratively unworkable and might "chill" protected corporate speech ignores the fact that courts routinely consider context in First Amendment cases, and that a well-defined procedure exists for determining whether the presumption of coverage established by the probative weight of the criteria set forth in Section 203 has been rebutted. *See infra* Point II(B).

Viewed in factual context, this is an easy case. Wisconsin Right to Life, Inc. ("WRTL") used corporate treasury funds to finance three advertisements criticizing Senator Feingold's position on President Bush's judicial nominees, and broadcast the advertisements in the months leading up to Senator Feingold's re-election bid. The advertisements directed listeners to a website explicitly opposed to Senator Feingold's re-election and were part and parcel of a long campaign by WRTL to oust Senator Feingold. Regulating these ads under BCRA advances the compelling state interests recognized in *McConnell*. WRTL simply has no right to a First Amendment exemption that would enable it to use corporate treasury funds for electioneering communications at the core of the electoral process. *See infra* Point II(C)(1).

Finally, the District Court's insistence on granting an as-applied exemption from Section 203, based solely on the absence of explicit words of electoral exhortation in the text of a corporate-funded advertisement, threatens to undercut Congress's statutory scheme and to destabilize the careful First Amendment balance established by this Court. In the guise of adjudicating WRTL's as-applied challenge, the District Court resuscitated the very "magic words" doctrine that Congress and this Court had rejected, effectively permitting an end run around the doctrine of *stare decisis*. *See infra* Point II(C)(2).

This appeal represents the latest round of gamesmanship among parties seeking to upset the terms of BCRA as sustained by this Court in *McConnell* and *WRTL I*. *Amici* urge the Court to reject the lower court's swing from one extreme to the other, to reaffirm longstanding ground rules for as-applied challenges, and to bring the strategic game to an end.

ARGUMENT

I. This Court Should End the Strategic Game Played by Both Sides in the Litigation Leading to this Appeal.

Since the passage of Section 203, proponents and opponents of corporate electioneering have been engaged in a strategic game, with each side attempting at some point to establish an extreme constitutional position. Proponents of corporate-funded electioneering are eager to carve a gaping loophole in BCRA in the name of preserving constitutionally protected issue speech. Opponents of corporate-funded electoral speech have been prepared to countenance restrictions on some issue speech in the name of preserving the statute. This Court should continue to reject both extremes, as it did in *McConnell* and *WRTL I*, and put the game to rest with this appeal.

The complaint in *McConnell* opened the first round of the strategic game. Before the ink was dry on Section 203, which bans corporate expenditures of more than $10,000 to fund "electioneering communications"—broadcast, cable, or satellite ads, aired within a fixed period before a federal election, that refer to a candidate in that election and target the candidate's constituents—challengers argued that the statute was facially unconstitutional because the provision might preclude corporate funding of some genuine issue speech.

The *McConnell* Court refused to take the bait, holding that the possibility that Section 203 might apply to some forms of corporate-funded "issue speech" did not require facial invalidation of the ban on corporate-funded "electioneering communications." Instead, applying strict scrutiny, *McConnell* held that Congress had a compelling state interest in preventing corporations from building and spending political war chests on federal elections, and that this interest justified the ban on the use of corporate general treasury funds to pay for election-influencing advertisements, even if the ads did not use "magic words" expressly advocating the election or defeat of a clearly identified candidate. *McConnell*, 540 U.S. at 205-06. The Court noted that thirty years of experience with the "magic words" test had demonstrated its vulnerability to evasion. *Id.* at 126-28, 193-94.

The Court's second encounter with Section 203, and the second round in the strategic game, took place in *WRTL I*, when this Court unanimously rejected the argument that *McConnell* precluded as-applied challenges to Section 203 in any setting where corporate-funded speech satisfied the statute's definition of "electioneering communications." That argument, made by BCRA's defenders, was the mirror image of the challengers' argument in *McConnell*; this time concern over preserving the prohibition on corporate-funded "electioneering communications" was deployed as a justification for banning at least some corporate-funded "issue speech." This Court once again refused the bait, stating: "In upholding § 203 against a facial challenge, we did not purport to resolve future as-applied challenges." 546 U.S. at 410.

The strategic game resumed on remand in the court below, when respondent Wisconsin Right to Life, Inc. ("WRTL"), a non-profit corporation that receives substantial funding from for-profit corporations, re-asserted its claim that three radio

advertisements that aired for the first time in the months prior to Senator Feingold's 2004 bid for re-election qualified for an as-applied exemption from BCRA. *Wisconsin Right to Life, Inc. v. FEC*, No. 04-1260, 2006 WL 3746669 (D.D.C. Dec. 21, 2006) ("*WRTL II*"). The advertisements, costing more than $10,000, carefully eschewed any "magic words" of explicit electoral exhortation, but criticized Senator Feingold's position on President Bush's judicial nominees and urged listeners to contact the Senator's office in connection with the Senate's failure to vote on those nominees. *Id.* at *1 & nn.3-5. WRTL argued that because the advertisements carefully avoided explicit electoral exhortation, they were constitutionally immune from Section 203's ban on corporate funding, notwithstanding their implicit criticism of Senator Feingold, their timing to coincide with the impending election, WRTL's well-known record of opposition to the Senator's re-election, and other powerful contextual evidence demonstrating that the purpose and perceived effect of the advertisements were to diminish the Senator's electoral prospects. *Id.* at *6.

In *WRTL II*, a two-person majority of the District Court refused to consider the advertisements' factual context in assessing their principal purpose and perceived effect. Instead, despite Congress's rejection of the "magic words" approach, and this Court's decision in *McConnell*, the District Court granted an as-applied exemption from BCRA because the four corners of the text did not contain "magic words" of electoral exhortation. *Id.* On appeal from *WRTL II*, the strategic game continues. While WRTL professes concern about corporate-funded "issue speech," its evident purpose is to open a massive loophole in Section 203, eviscerating Congress's ability to ban corporate-funded "electioneering speech" at the electoral core.

Amici urge the Court to reject, for the third time, the invitation to choose between over- and under-regulation of

corporate-funded electoral speech. *Amici* believe that the strategic game should end. It is past time to get down to the business of developing workable criteria designed to carry out the First Amendment balance established in *McConnell* and *WRTL I*.

II. WRTL's Adverstisements Do Not Qualify for an As-Applied Exemption from Section 203's Ban on Corporate Funding of "Electioneering Communications."

The District Court's "four corners" approach—turning a blind eye to context—hardly qualifies as a serious effort to respect the First Amendment balance struck in *McConnell*. The District Court held that the literal text of an advertisement is the sole determinant of whether it may be funded by corporate treasury funds. Contextual evidence bearing on: (i) the purpose of WRTL and its for-profit corporate donors; and (ii) the perceived meaning of the advertisements' clearly implied electoral message, may not be considered, held the District Court, because such a fact-intensive approach, would "chill" protected speech and prove difficult to administer in the waning days of a campaign. *See WRTL II*, 2006 WL 3746669, at *6-8. The District Court's analysis is triply flawed.

A. The District Court Plainly Erred in Refusing To Consider the Factual Context of the Advertisements.

Close analysis of facts and circumstances is the very hallmark—indeed, the *raison d'etre*—of an as-applied challenge. Unlike a facial challenge, which views a statute's constitutionality from the perspective of a run-of-the-mill target, an as-applied challenge focuses on the particularized facts and circumstances of a single litigant in deciding whether a law that may be validly applied to most persons must be suspended in the factual context before the Court.

An as-applied challenge is, therefore, necessarily fact-intensive, requiring a party to place evidence before the court justifying a constitutionally-driven individualized exemption. *See, e.g.*, *United States v. American Library Ass'n*, 539 U.S. 194, 215 (2003) (Kennedy, J., concurring) (rejecting facial challenge but permitting individuals to bring as-applied challenges based on specific, concrete factual showing); *Boy Scouts of America v. Dale*, 530 U.S. 640, 648-54 (2000) (concluding that specific facts had been adduced showing that application of anti-discrimination statute imposed substantial burden on the litigant's freedom to associate); *Bowen v. Kendrick*, 487 U.S. 589, 623 (1988) (O'Connor, J., concurring) (calling for District Court to make "detailed factual findings" about program's administration in adjudicating an as-applied Establishment Clause challenge to financial aid statute); *id.* at 625 (Kennedy, J., concurring) (insisting on specific evidence about how religious entities "spend [their] grant[s]" to adjudicate an as-applied challenge); *see also Sabri v. United States*, 541 U.S. 600, 609 (2004) (preferring as-applied to facial challenges because the latter "carries too much promise of 'premature interpretatio[n] of statutes' on the basis of factually bare-bones records" (quoting *United States v. Raines*, 362 U.S. 17, 22 (1960))). Indeed, the intensely fact-specific nature of an as-applied challenge is why this Court insists on conducting an independent *de novo* review of the record to ensure that improper fact finding does not lead to a denial of constitutional rights. *See Boy Scouts*, 530 U.S. at 648-49; *Edwards v. South Carolina*, 372 U.S. 229, 235 (1963).

The District Court's refusal to consider the factual context in deciding whether to grant an as-applied exemption turns as-applied jurisprudence on its head. In effect, the District Court granted a facial exemption from a facially valid statute, an incoherent approach that undermines the very statute the court purports to apply. It is one thing to recognize, as this Court did in *WRTL I*, that as-applied challenges remain open;

it is quite another to say, as the District Court did, that a court should consider an as-applied challenge without undertaking a full review of the facts and circumstances of the advertisements allegedly entitled to a constitutional exemption.

This Court's First Amendment jurisprudence precludes the District Court's analysis. In numerous First Amendment contexts, this Court considers both the text of the speech in question, as well as the broader context surrounding the speech, in determining whether or not to extend constitutional protection. For example, the Court regularly examines contextual evidence in determining: (i) whether an individual's communicative conduct constitutes protected symbolic speech, *see Texas v. Johnson*, 491 U.S. 397, 405-06 (1989); *Spence v. Washington*, 418 U.S. 405, 410-11 (1974); (ii) whether a public employee's political remarks or private defamatory speech involved matters of public concern, *see Rankin v. McPherson*, 483 U.S. 378, 384-85, 386-87 (1987); *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 761 (1985); and (iii) whether a communication is protected speech or an unlawful threat or exhortation to violence, *see Virginia v. Black*, 538 U.S. 343, 360, 362-63 (2003); *Hess v. Indiana*, 414 U.S. 105, 106-09 (1973); *Watts v. United States*, 394 U.S. 705, 708 (1969); *see also Milk Wagon Drivers of Chicago, Local 753 v. Meadowmoor Dairies*, 312 U.S. 287, 293 (1941) ("[An] utterance in a context of violence can lose its significance as an appeal to reason and become part of an instrument of force. Such utterance was not meant to be sheltered by the Constitution.").[2]

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[2] Likewise, in determining whether government-sponsored religious expression violates the Establishment Clause, the Court examines not merely the religious expression the government has sponsored but the larger context of that speech. *See Van Orden v. Perry*, 545 U.S. 677, 691 (2005); *id.* at 699-704 (Breyer, J., concurring); *Santa Fe Indep. School*

The lesson of this long line of cases is that, often, the literal words a speaker utters, considered alone, do not adequately capture the relevant First Amendment considerations. To use a famous literary example, the literal text of Marc Antony's oration at Caesar's funeral said one thing, while the context said another. *See* William Shakespeare, *The Tragedy of Julius Caesar* act III, sc. ii. In short, the District Court's refusal to consider context would strip the regulatory process of adequate tools to protect federal electoral campaigns from sophisticated corporate-funded communications having the clear purpose and perceived effect of supporting or opposing a candidate for public office.

B. The District Court's Refusal To Consider Factual Context Was Not Required by Administrative Necessity or a Concern with "Chilling" Corporate-Funded Political Speech.

The massive congressional record compiled in connection with the enactment of Section 203, the thorough record compiled by the District Court in *McConnell*, and this Court's recognition in *McConnell* of the failure of the bright-line "magic words" test adopted in *Buckley v. Valeo*, 424 U.S. 1 (1976) (per curiam), provided the court below with an unmistakable warning that granting as-applied exemptions solely on the basis of the literal text would seriously weaken, perhaps destroy, the regulatory scheme. The *WRTL II* majority argued, nevertheless, that the practical difficulty in assessing factual context under the time pressures of a political campaign, coupled with a concern that some corporate speakers might be "chilled," forced the court to

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Dist. v. Doe, 530 U.S. 290, 307-08 (2000); *Lynch v. Donnelly*, 465 U.S. 668, 692-93 (1984) (O'Connor, J., concurring).

adopt a less-than-optimal approach. *See WRTL II*, 2006 WL 3746669, at *7-8. The District Court's twin justifications for banishing contextual evidence from its as-applied analysis fall apart on close scrutiny.

1. Courts Are Competent To Consider Context in Evaluating As-Applied Challenges.

Courts are perfectly competent to consider contextual factual material in connection with the resolution of a request for an as-applied exemption from Section 203. This Court's election law jurisprudence is replete with the duty to conduct precisely the fact-intensive analyses that the court below sought to avoid.

For example, *McConnell* holds that minor parties can claim a constitutional exemption from BCRA's soft-money ban by showing that the ban on receiving or spending soft money "prevents it from 'amassing the resources for effective advocacy,'" *McConnell*, 540 U.S. at 159 (quoting *Buckley*, 424 U.S. at 21), a test that is nothing if not fact-intensive. A similar standard applies if a litigant wishes to mount an as-applied challenge to BCRA's ban on soft money contributions to state and local political parties. *See id.* at 173 (requiring as-applied challenger to show that the ban's effect on contributions "is 'so radical in effect as to . . . drive the sound of the [recipient's] voice below the level of notice'" (quoting *Nixon v. Shrink Missouri Government PAC*, 528 U.S. 377, 397 (2000))).

In the same vein, *Brown v. Socialist Workers '74 Campaign Committee*, 459 U.S. 87 (1982), holds that a minor party will be entitled to as-applied relief from a campaign finance disclosure statute if it can show a reasonable probability that disclosure will lead to threats, harassments, and reprisals. *Id.* at 91-93, 98-101. This sort of fact-intensive analysis applies, as well, in other areas of this Court's

election law constitutional jurisprudence. *See Miller v. Johnson*, 515 U.S. 900, 910-13 (1995) (imposing fact-intensive purpose analysis in challenge to drawing of racially-gerrymandered districts); *Anderson v. Celebrezze*, 460 U.S. 780, 789-91, 792-93 (1983) (mandating fact-intensive undue burden analysis in First Amendment challenge to laws regulating access to the ballot).

Judged against this mass of precedent, the District Court's conclusion that readily available contextual evidence should be ignored in assessing as-applied challenges to BCRA's corporate electioneering ban was manifest error. In fact, compared with the fact-intensive inquiries the Court has mandated in other campaign finance and election law settings, the contextual factual issue in this case was child's play. Given the ads' implicit criticism of Sen. Feingold, WRTL's long-standing hostility to Senator Feingold, the group's open opposition to him in the website to which the ads directed listeners, and the suspicious timing of the so-called "grassroots lobbying," it is simply impossible for any reasonable finder of fact to review the record in this case and conclude that an as-applied exemption is constitutionally required under *McConnell*.

Given the overwhelming contextual record, this case is easy. Adequate procedures exist to deal swiftly and surely with harder cases, as well. As this Court noted in *McConnell*, the combined probative weight of the objective indicia for coverage in Section 203—(i) broadcast, cable, or satellite advertising costing more than $10,000; (ii) within a fixed period of a federal election; (iii) that refers to a clearly identified candidate in the forthcoming federal election; and (iv) targets the candidate's constituents—creates a powerful factual inference that the speech has both the purpose and perceived effect of supporting or opposing a candidate for federal office. *McConnell*, 540 U.S. at 206 (observing that the vast majority of covered ads had an electioneering

purpose); *see also id.* at 127 ("[T]he conclusion that [supposed issue] ads were specifically intended to affect election results was confirmed by the fact that almost all of them aired in the 60 days immediately preceding a federal election."). At a minimum, therefore, the inherent probative weight of the four indicia satisfies the government's burden of production on the issues of the communication's purpose and perceived effect. *See McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).

The essence of an application for an as-applied exemption from such presumptively constitutional regulation is the presentation of factual evidence tending to rebut the presumption. *See Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981); *Batson v. Kentucky*, 476 U.S. 79 (1986). At a minimum, an application for an exemption must be accompanied by admissible evidence tending to support the exemption, generally a sworn statement by the speaker that the advertisement does not have the purpose of supporting or opposing the candidate mentioned in the advertisement. *See Burdine*, 450 U.S. at 254-55 & n.9. In addition, the exemption application should be accompanied by admissible evidence tending to prove that the advertisement is not and will not be perceived as thinly-disguised electioneering speech. Once an applicant for an exemption has presented evidence tending to prove lack of purpose and perceived effect, the evidence may be rebutted, after which the District Court must make a finding of fact. In this case, given the overwhelming factual record, the issue simply is not in doubt. WRTL intended its corporate-funded advertisements to harm Senator Feingold's re-election efforts. Given the contextual record, no reasonable finder of fact could rule otherwise.

2. Consideration of the Factual Context Does Not Threaten Constitutionally Protected Issue Speech.

Such a classic fact-finding procedure poses no danger of "chilling" genuine corporate-funded "issue speech." It is simply unrealistic to assume that corporate speakers—hardly the most vulnerable of persons—will refuse to air genuine corporate-funded issue advertisements simply because a court adjudicating an as-applied challenge will consider not only the literal text, but the organization's past history of supporting or opposing the candidate specifically identified in the ad or the ad's referral of the viewer (or listener) to other unquestionably electoral exhortations, as well as the timing and targeting of the advertisement. Such a procedure will deter (as it should) only those who wish to air corporate-funded electioneering ads masquerading as issue ads in an effort to influence the outcome of elections. Under *McConnell*, such persons have no right to relief.

C. Viewed in Factual Context, WRTL's Advertisements Do Not Qualify for an As-Applied Exemption from Section 203's Ban on Corporate Electioneering.

This Court's precedents leave no doubt about the standard to be applied in an as-applied challenge to the application of a facially constitutional statute. A reviewing court must first decide whether a ban on corporate funding of the advertisements in question would advance the compelling governmental interests recognized by the Court in *McConnell* and earlier precedents of this Court. *See McConnell*, 540 U.S. at 205; *FEC v. Beaumont*, 539 U.S. 146, 161 (2003); *Colorado Republican Fed. Campaign Comm. v. FEC*, 518 U.S. 604 (1996); *FEC v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238 (1986). Second, if granting an as-applied exemption would significantly undermine BCRA's constitutional statutory scheme, the as-applied challenge must fail. *E.g.*, *United States v. Edge Broad. Co.*, 509 U.S.

418 (1993) (refusing to grant as applied exemption from broadcasting ban because of impact on facially valid regulatory scheme); *United States v. Lee*, 455 U.S. 252, 259-60 (1982) (refusing to exempt Amish employers from paying social security taxes despite substantial burden on their free exercise rights because exemption would compromise social security system).

1. Precluding WRTL's Ads Furthers the Compelling State Interests Recognized in *McConnell*.

Applying the proper standards, this is an easy case for rejecting the application. WRTL's advertisements are virtual replicas of the phony issue ads BCRA was designed to eliminate. The advertisements use implicit criticism to tell the electorate to oppose Senator Feingold and the policies with which he is identified. The compelling state interests *McConnell* recited in rejecting the facial challenge to a ban on corporate-funded electioneering speech—interests in preserving the integrity of the electoral process, combating real and perceived corruption, and preventing the circumvention of BCRA's contribution limits—fully support BCRA's application to WRTL's anti-Feingold advertisements.

McConnell emphasized two points in finding that a ban on corporate electioneering satisfied strict scrutiny. First, the *McConnell* Court noted that forbidding corporations from using treasury funds to pay for election-related political advertisements imposes a limited speech burden since corporations remain free to express any political viewpoint they choose, as long as corporate PAC money is used to pay for the speech.

> "The PAC option allows corporate political participation without the temptation to use corporate funds for political influence, quite possibly at odds

> with the sentiments of some shareholders or members, and it lets the government regulate campaign activity through regulation and disclosure without jeopardizing the associational rights of advocacy organizations' members."

McConnell, 540 U.S. at 204 (quoting *Beaumont*, 539 U.S. at 163).

Second, *McConnell* held that BCRA's ban on corporate-funded electioneering speech is justified by two well-recognized compelling state interests. The ban ensures that corporations do not use the benefits of the corporate form to amass and spend political war chests capable of destabilizing the democratic process. *Id.* at 205; *see also Beaumont*, 539 U.S. at 153-55 (collecting cases); *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652, 658-59 (1990) ("[S]tate-created advantages not only allow corporations to play a dominant role in the Nation's economy, but also permit them to use 'resources amassed in the economic marketplace' to obtain 'an unfair advantage in the political marketplace.'" (quoting *MCFL*, 479 U.S. at 257)); *FEC v. National Right to Work Comm.*, 459 U.S. 197, 207 (1982) ("[S]ubstantial aggregations of wealth amassed by the special advantages of the corporate form of organization should not be converted into political 'war chests' which could be used to incur political debts from legislators . . . .").

The ban also prevents circumvention of limits on individual contributions to candidates—laws this Court has repeatedly upheld against First Amendment challenge—through the artifice of diverting money through the corporation. *See McConnell*, 540 U.S. at 205 ("[R]ecent cases have recognized that certain restrictions on corporate electoral involvement permissibly hedge against 'circumvention of [valid] contribution limits.'" (quoting *Beaumont*, 539 U.S. at 155)).

The text of the advertisements at issue here and two pieces of objective and undisputable contextual evidence demonstrate that WRTL's ads were designed to affect, and were perceived as designed to affect, electoral outcomes. Indeed, they are exactly the kind of sham issue ads BCRA was enacted to prevent. In the guise of discussing a political issue, they criticize one candidate's voting record on a controversial issue, and urge action directed at the candidate, clearly suggesting that he should not be re-elected. Moreover, what was implicit in the text of the advertisement was made explicit in the website to which the ad directed viewers. That site, as the dissenting judge below observed, featured alerts that "excoriat[ed]" Senator Feingold for his filibustering of President Bush's judicial nominees and urged the Senator's defeat. *WRTL II,* 2006 WL 3746669, at *14 (Roberts, J., dissenting).

McConnell itself confirms that this kind of ad, which criticizes the political stances of a candidate and asks the voters to contact him or her, is tantamount to expressly advocating the criticized candidate's defeat. "Little difference exist[s] . . . between an ad that urge[s] viewers to 'vote against Jane Doe' and one that condemn[s] Jane Doe's record on a particular issue before exhorting viewers to 'call Jane Doe and tell her what you think.'" *McConnell,* 540 U.S. at 126-27; *see also id.* at 170 ("[A]ny public communication that promotes or attacks a clearly identified candidate directly affects the election in which he is participating."); *id.* at 193 ("[A]lthough the . . . advertisements do not urge the viewer to vote for or against the candidate in so many words, they are no less clearly intended to influence the election.").

The timing of WRTL's broadcast of the ads, which *McConnell* itself treats as probative, *see id.* at 127, further supports the conclusion that WRTL broadcast these three advertisements to convince Wisconsin voters not to re-elect

Sen. Feingold. The three advertisements at issue here were the only advertisements that WRTL broadcast concerning the filibustering of judicial nominees during the whole of the controversy over confirmation of President Bush's judicial nominees. As the dissent below observed, WRTL began broadcasting the ads on July 26, 1994, *after* the last of the judicial filibuster cloture votes in that session, and *after* the Senate had recessed for six weeks, *see WRTL II*, 2006 WL 3746669 at *16 (Roberts, J., dissenting), but just in time to tee up a challenge to BCRA. Further, WRTL did not broadcast any advertisements concerning filibustering after Senator Feingold's re-election in November 2004, even though the same group of Senators continued to filibuster President Bush's nominees. *Id.* The timing of the ads thus confirms what is implicit in the text: these ads were aimed at defeating Senator Feingold's re-election bid.

Finally, WRTL has long opposed Senator Feingold and its PAC has long supported his political opponents. As the dissent pointed out, WRTL made Senator Feingold's defeat a "priority" and in 2004 declared its "resolve to do everything possible to win Wisconsin for President Bush and send Russ Feingold packing!" *Id.* at *15-16. Broadcasting these three advertisements was part and parcel of WRTL's strategy to defeat Senator Feingold. That is why it ran the ads encouraging voters to tell Senator Feingold to change his policy, and did so toward the end of the election cycle rather than when Congress was in session and actually voting on the filibusters of judicial nominees about which WRTL claims to be so concerned. Under *McConnell*, BCRA may—indeed, must—be applied to these ads, which undoubtedly, were "intended to influence the voters' decision and [had] that effect." *McConnell*, 540 U.S. at 206.

2. Granting the As-Applied Exemption Sought by WRTL Would Undermine the Statutory Scheme Upheld in *McConnell*.

The District Court's judgment should be reversed for a second reason. The District Court never considered the effect of granting an as-applied exemption on the facts of this case on the statutory scheme upheld in *McConnell*. The lower court simply ignored the fact that the exemption it created would decimate BCRA's statutory scheme, leaving a gaping hole that would frustrate the compelling state interests *McConnell* recognized. That effect, alone, supports rejection of the WRTL's as-applied challenge.

In the final analysis, the District Court's opinion rests on dissatisfaction with the *McConnell* Court's refusal to erect a bright-line rule for as-applied challenges similar to the discredited "magic words" test. Instead of seeking to implement the *McConnell* Court's directive to work out a First Amendment balance, the District Court's reasoning upsets that balance and re-establishes an unworkable scheme that severely undercuts the holding of *McConnell* itself.

Upholding WRTL's as-applied challenge would vitiate the statutory scheme that *McConnell* adjudged valid. It would mean that WRTL and any other corporate entity could run virtually any corporate-funded campaign advertisements it wished—free from even a duty to disclose—so long as it chose the words of its ads carefully and criticized the candidates it opposed in coded language, rather than direct attacks. Such a ruling would create a hole in BCRA's scheme big enough to drive a truck through and would effectively reinstate the flawed "magic words" approach that BCRA repudiated. As the Court's as-applied jurisprudence has made clear time and again, courts should not radically remake valid statutory schemes in the guise of vindicating as-applied claims. Plaintiffs should not be permitted to parlay an overly

broad as-applied challenge into an end-run around the doctrine of *stare decisis*.

The Court's cases make clear that while an as-applied challenge is an appropriate way to trim the unconstitutional fat from a statute; it may not to be used to vitiate an otherwise constitutional statutory scheme. In *United States v. Lee*, 455 U.S. 282 (1982), the Court rejected an as-applied challenge brought by an Amish employer who refused to pay social security taxes in accordance with the dictates of his religion. Applying strict scrutiny (then the prevailing constitutional test), the Court held that recognizing an as-applied exemption risked vitiating the compelling state interests underlying the tax statute. Accommodating the Amish employer, the Court held, would "unduly interfere with fulfillment of [a compelling] governmental interest," *id.* at 259, because it would open the door to a wide range of religious-based exemptions incompatible with a mandatory tax system. *Id.* at 259-60 ("[I]t would be difficult to accommodate the comprehensive social security system with myriad exceptions flowing from a wide variety of religious beliefs.").

Likewise, in *United States v. Edge Broadcasting Co.*, 509 U.S. 418 (1993), the Court rejected an as-applied challenge by a North Carolina radio station owner who sought to broadcast lottery advertisements in violation of a federal statute prohibiting advertisements by stations in jurisdictions, such as North Carolina, that do not sponsor a lottery. Edge claimed that it was entitled to a constitutional exemption because it was located three miles from the border with Virginia, which sponsored a lottery, and because Virginians constituted virtually of all its listening audience.

In rejecting Edge's as-applied challenge, the Court emphasized that it could not consider Edge's as-applied claim in isolation; it had to consider the system-wide effects

of granting Edge and all other similar-situated persons a constitutional exemption. "We judge the validity of the restriction in this case by the relation it bears to the general problem [Congress regulated] . . . not by the extent to which it furthers the Government's interest in the individual case." *Id.* at 430-31. Because granting Edge an as-applied exemption would have frustrated Congress' valid choice to accommodate the policies of lottery and non-lottery states, the Court rejected Edge's claim for a constitutionally-compelled exemption. *Id.* at 431-35.

As in *Lee* and *Edge*, granting WRTL an as-applied exemption on the facts of this case would subvert the statutory scheme this Court approved in *McConnell*, re-opening the loophole that BCRA closed. It would allow groups like WRTL and their corporate donors to pour millions and millions of dollars of corporate treasury funds into federal elections, so long as "magic words" were not used in the text. As *Lee* and *Edge* teach, an as-applied challenge must fail where, as here, it would wreak havoc on a valid statutory scheme.

CONCLUSION

For the above-stated reasons, the decision of the District Court should be reversed, and Appellees' application for an as-applied exemption from section 203 should be denied.

Respectfully submitted,

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